BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
	)	

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC., SBC COMMUNICATIONS INC., AND THE VERIZON TELEPHONE COMPANIES ON ILLINOIS PUBLIC TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR A DECLARATORY RULING

INTRODUCTION AND SUMMARY

Illinois Public Telecommunications Association ("IPTA") seeks a declaratory ruling with respect to two issues. First, it seeks a declaration that IPTA members are entitled to refunds from Illinois Bell Telephone Company ("SBC Illinois") and Verizon North Inc. and Verizon South Inc. ("Verizon Illinois") for payphone line charges paid after April 15, 1997, and before current rates went into effect, in the case of SBC Illinois, or before December 13, 2002, in the case of Verizon Illinois. Second, it seeks a declaration that SBC Illinois and Verizon Illinois were not eligible for payment of per-call compensation during the same period. The petition should be denied in its entirety for two basic reasons. First, IPTA's petition – which challenges a specific state commission order that is already being reviewed under state procedures – is not an appropriate subject for the discretionary relief that IPTA seeks. Second, even if the Commission were to address the merits, IPTA's claims are baseless.[1]

[1] The IPTA petition addresses Illinois only. BellSouth Telecommunications, Inc. ("BellSouth") has no affiliated ILEC operating in Illinois, and the Commission's rules governing rates for basic payphone lines do not apply to non-BOC LECs, like Verizon Illinois. Memorandum Opinion and Order, *Wisconsin Public Service Commission; Order Directing Filings*, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *aff'd sub nom. New England Pub. Communications Council, Inc. v.*

I. A. With regard to the refund issue, the Commission has ruled that state commissions should enforce any federal requirements regarding BOC intrastate payphone line rates. IPTA has already sought the same relief its seeks from the Commission from the Illinois Commerce Commission ("ICC"), which made clear that it would enforce any applicable federal law. IPTA has also sought review of the ICC's decision in state court, which also must apply federal law to federal issues and has denied IPTA's request for a referral to the Commission. In these circumstances, principles of comity and collateral estoppel argue against the Commission taking action on the petition. Furthermore, the application of prior Commission orders to a particular set of facts – including state-specific circumstances that affect the appropriateness of particular remedies – is not an appropriate subject for a declaratory ruling.

B. Even if the Commission were to consider the issue, IPTA's claim is also wrong on the merits. With regard to Verizon Illinois, as the Commission itself has recognized, the Commission had no authority to require non-BOC LECs to set payphone line rates in conformity with the New Services Test. Accordingly, any rights that IPTA members may have with regard to this issue arise exclusively under state law and the Commission has no jurisdiction.

C. As to SBC Illinois, the Commission has determined that basic payphone line rates would continue to be set through *state* tariffs, knowing that associated state procedures and remedies would govern enforcement of federal rights. Moreover, the Commission has never stated or implied that, where a state commission determines that payphone line rates should be reduced to comply with the New Services Test, payphone providers are automatically entitled to

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FCC, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004). BellSouth, SBC Communications Inc. ("SBC"), and the Verizon telephone companies ("Verizon") therefore have different interests at stake in this proceeding but nevertheless have filed jointly to avoid repetitious argument and to reduce the burden on the Commission.

refunds. To the contrary, the Commission has specifically noted that *existing* payphone line rates might be compliant with the New Services Test.

D. The Commission should not address the correctness of the ICC Order in light of state procedural rules and available remedies. If the Commission were to do so, however, the determination of the ICC that IPTA members were not entitled to any refund is compelled by the filed rate doctrine.

II. A. The question of LECs' eligibility for payphone compensation is likewise an inappropriate subject for a declaratory ruling. Because IPTA has suffered no injury, it lacks standing to raise this issue; as a discretionary matter, therefore, IPTA should not be permitted to invoke the Commission's procedures with respect to this issue.

B. In any event, IPTA is clearly incorrect that either SBC Illinois or Verizon Illinois was ineligible for payphone compensation at any time after April 15, 1997. As to Verizon Illinois, as noted above, any requirement that it set its payphone line rates in conformity with the New Services Test is beyond the Commission's statutory authority. As to both carriers, the Commission provided that BOCs were required to "have in effect intrastate tariffs for basic payphone services"; both SBC Illinois and Verizon Illinois did have such tariffs in effect. Subsequent proceedings requiring the companies to reduce the rate to be charged under their tariffs cannot alter that fact.

BACKGROUND

IPTA seeks a declaration that the "ICC decision denying the IPTA members refunds or reparations is inconsistent with the Commission's Payphone Orders." IPTA Pet'n at 3. IPTA fails to describe the underlying basis for the ICC's decision, however, because those facts are fatal to its arguments.

The ICC Order at issue here[2] was the result of an investigation initiated by the ICC in December 1997 in response to a petition filed by IPTA in May of that year. Among the issues addressed in that state commission proceeding was "LEC compliance with the pricing provisions of the [New Services Test] in the provisioning of pay telephone service." ICC Order at 2.[3]

The ICC examined both SBC Illinois' existing tariff and Verizon's existing tariff. SBC Illinois' rates for payphone services had been reviewed and approved by the ICC "at least twice." ICC Order at 42. Initially, in 1985, SBC Illinois had proposed establishing rates for service provided to independent payphone providers ("IPPs") based on rates for comparable retail services. "None of the parties, including the IPTA, objected to those rates." *Id.* The ICC subsequently, in 1988, initiated a re-examination of issues related to the payphone industry as a result of a complaint proceeding initiated by IPTA. *See id.* at 5. In that proceeding, SBC Illinois and IPTA entered into a stipulation (in 1995) "which was reviewed, approved, and adopted by the Commission as an order on the merits." *Id.* "IPTA and SBC agreed to a discounted rate schedule for payphone usage. The parties also agreed that '[SBC Illinois'] other network service offerings shall . . . follow the rates, terms and conditions for business rates." *Id.* at 6. And the parties "agreed that those provisions of the settlement would 'extend through June 30, 2005.'" *Id.*

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[2] *See* Interim Order, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, Docket No. 98-0195 (Ill. Comm. Comm'n Nov. 12, 2003) ("ICC Order").

[3] As the ICC staff observed in its response to Exceptions to the proposed order filed by IPTA, the reason that the proceeding was so protracted was "primarily attributable to IPTA's desultory pursuit of this case." ICC Order at 43 n.16 (quoting Staff Response to Exceptions at 20). "For example, IPTA filed its direct testimony nearly *six months* late." *Id.* (emphasis added). "While delays . . . have not by any means been exclusively attributable to IPTA, IPTA, as petitioner here, has the laboring oar in pursuing its petition . . . . IPTA has not plied that laboring oar with any great degree of diligence." Staff Response to Exceptions at 20-21.

"Because SBC had already tariffed its payphone services, and because those tariffs had already been reviewed and found reasonable by the [ICC], SBC did not file any new tariffs" in response to the Commission's *Payphone Orders*. *Id.* "Instead, SBC supplied additional cost documentation" to demonstrate compliance with the New Services Test which was "accepted by the Commission." *Id.*

The rate for Verizon's Customer Owned Coin Telephone service (*i.e.*, "dumb" payphone lines used with the "smart" payphones that IPPs almost invariably use) was approved by the Commission in Verizon's last general rate case. *Id.* In compliance with the requirements of the *Payphone Orders*, Verizon filed a tariff for "Coin Line" service (*i.e.*, "smart" lines) in January 1997; that tariff was not suspended and was therefore deemed lawful. In addition, on May 19, 1997, Verizon filed supplemental documentation to demonstrate that its payphone line rates complied with the New Services Test; it also reduced rates for certain network functions.

In the ICC Order, the ICC found that the basic payphone line rates of both SBC Illinois and Verizon Illinois should be reduced in accordance with the New Services Test as set forth in the Commission's *Wisconsin Order*. The Commission rejected, however, IPTA's arguments that its members were entitled to refunds for the period prior to the filing of the new rates. The ICC noted that, as a matter of both federal and state law, "rates that have been reviewed and approved by the appropriate agency cannot later be subject to refunds." ICC Order at 42 (citing, *inter alia*, *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932)). The Commission noted that it had approved SBC Illinois' rates and that the terms of the ICC's prior order had governed SBC Illinois' rates since 1985. In one key passage, the ICC noted:

> Significantly, from the time that the FCC established its NST through today, there has been *no complaint to formally challenge the rates at issue in this case.* This lack of direct action on the part of the IPTA (a party to the 1995 settlement establishing the current rates) is consistent with SBC [Illinois']

> observations that the IPTA has benefited from . . . deep discounts on IPP usage rates and other advantages conferred by our Order.

Id. at 42-43 (emphasis added).

With regard to Verizon Illinois, the ICC held that there was no basis in federal law for requiring refunds because "the FCC exceeded its jurisdictional authority when it required non-BOC ILECs to file state tariffs for payphone services pursuant to the [New Services Test]." *Id.* at 43.

IPTA filed an appeal from the ICC Order in the Appellate Court of Illinois. After filing its appeal, IPTA filed a motion to stay and for a referral to this Commission on the basis of primary jurisdiction. The court denied the motion. Merits briefing on IPTA's appeal is now underway: IPTA filed its opening brief in July, and respondents' briefs are due in September.

DISCUSSION

I. THE COMMISSION SHOULD DENY THE REQUEST FOR A DECLARATION THAT IPTA MEMBERS ARE ENTITLED TO REFUNDS

A. The Commission Should Exercise Its Discretion To Deny the Petitions Unaddressed

The Commission has "broad discretion" in deciding whether to issue a declaratory ruling. Order, *Petition of Home Owners' Long Distance, Inc. for a Declaratory Ruling*, 14 FCC Rcd 17139, 17145, ¶ 12 (1999); *see also* Memorandum Opinion and Order, *Omnipoint Communications, Inc. New York MTA Frequency Block A*, 11 FCC Rcd 10785, 10788, ¶ 7 (1996) ("*Omnipoint Order*"); *Yale Broad. Co. v. FCC*, 478 F.2d 594, 601-02 (D.C. Cir. 1973). In this case, for two related reasons, the Commission should deny IPTA's petition for a declaration that its members are entitled to refunds of amounts paid for payphone service under state tariffs in effect in Illinois *without* addressing the merits.

First, because of the limited scope of the declaration that IPTA seeks, its petition is nothing more than an effort to pursue a parallel appeal of the ICC's determination that no refunds are due. But the Commission does not sit in review of state commission decisions, and – particularly in light of the fact that the Illinois appellate court denied IPTA's motion for a primary jurisdiction referral – principles of comity and collateral estoppel counsel the Commission to reject IPTA's petition. Second, the question of the appropriate remedy in an individual state necessarily depends on the circumstances in that state. Resolution of the question presented by IPTA's petition therefore would not contribute substantially to resolving any uncertainty that might exist.

The Commission held that it would "rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996) ("*Order on Reconsideration*"); *see also Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 16 (state commissions, and not the Commission, should "ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276"). The Commission has made clear that this determination reflects "interest[s] of federal-state comity." *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 16. Accordingly, the Commission will not take over that state commission role unless state commissions are "unable" to carry it out. *Id.*[4]

[4] For example, in the *Wisconsin Order*, the Commission addressed the issue presented only because the Wisconsin Public Service Commission found that it had no jurisdiction to address the issue. *See Wisconsin Order*, 17 FCC Rcd at 2057, ¶ 20. Even in light of this, the Commission declined to address Wisconsin-specific rates, instead urging the Wisconsin commission to do so. *See id.* at 2071, ¶ 66.

That is plainly not the case here: IPTA presented all of the arguments that it makes here to the ICC, which fully considered and treated as binding all requirements of federal law in resolving the issues presented here. IPTA has a forum available to it for pursuit of any claims that the ICC Order violates federal law – an appeal in Illinois appellate court – and it is actively pursuing that course. While IPTA asked the court to refer the issue to the FCC pursuant to the doctrine of primary jurisdiction, the court rejected IPTA's request. *See* Order, *Illinois Publ. Telecomms. Ass'n v. Illinois Commerce Comm'n*, No. 1-04-0225 (Ill. App. 1st Dist. July 1, 2004). Under these circumstances, entertaining IPTA's petition would represent a serious intrusion on the proper role of the ICC and the Illinois state courts in enforcing state and federal law.

Furthermore, because IPTA has a full and fair opportunity to litigate these issues in a state forum – including through a direct appeal in state court – it should not be permitted to mount a collateral attack on the state commission's ruling before the Commission. This is not a case where a petitioner seeks a clarification of a prior Commission order so that it can be properly applied in any number of different tribunals. Rather, it is a challenge to a particular "ICC decision denying the IPTA members refunds or reparations." IPTA Pet'n at 3. The Commission should not entertain such a collateral attack.

Relatedly, because IPTA's petition addresses a single state commission determination, the issues it raises are not appropriate for resolution through a declaratory ruling. This Commission has made clear that a declaratory ruling will not contribute substantially to "terminating a controversy or removing uncertainty," 47 C.F.R. § 1.2, in cases where the resolution of the petition depends on unique circumstances. *See, e.g.*, *Omnipoint Order*, 11 FCC Rcd at 10789, ¶ 9 (noting that declaratory ruling inappropriate where issue presented is best

resolved on a "case-by-case basis"). Even with regard to IPTA's petition, the Commission would have to take account of a number of procedural facts and circumstances that IPTA has not revealed in its petition and that the ICC could properly take into account in crafting an appropriate remedy. *Cf.* Memorandum Opinion and Order, *Cascade Utils., Inc.*, 8 FCC Rcd 781, 782, ¶ 12 (C.C.B. 1993) (denying petition for declaratory ruling where critical facts were "unclear from the record"). For example, IPTA does not reveal that it stipulated, in 1995, that SBC Illinois' rates for payphone line service were reasonable and should remain in place until 2005. At the time it signed that stipulation, IPTA was fully aware of pending federal legislation that could affect IPTA's rights. The ICC explicitly took that stipulation into account in denying IPTA's claim for refunds – in the ICC's words, "IPTA . . . enjoyed deep discounts on IPP usage rates and other advantages conferred" which "severely undercuts the IPTA refund argument." ICC Order at 43.

To cite another example, the ICC relied prominently on the fact that IPTA did *not* file any "complaint to formally challenge the rates at issue in this case." *Id.* at 42. IPTA's choice of procedure – the filing of a petition requesting that the Commission "initiate an investigation," *see id.* at 2 – can of course affect the availability of particular remedies. For example, in *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Co.*, 17 FCC Rcd 24201, 24221, ¶ 49 (2002), *aff'd, Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004), complainants argued that its members should be excused from filing formal complaints to challenge defendants' imposition of EUCL charges because APCC had filed a petition for a declaratory ruling on the same topic. The Commission emphatically rejected the argument, noting that complainants could have preserved their rights by filing a formal complaint but had not done so. *Id.* at 24226-27, ¶ 60 (noting that failure to file a formal

complaint "borders on the incomprehensible"). And there are a number of other factors that the ICC took into account – including IPTA's own lack of diligence in pursuing its petition, and its failure to establish a record to support certain arguments – in determining that refunds should not be ordered.

Moreover, resolution of the issue presented by IPTA's petition would not say anything about the appropriateness of refunds as a remedy in other proceedings in other states. What remedies might be available could depend on the particular procedural facts and legal regimes of individual states.[5] IPTA's petition thus does not provide an appropriate vehicle for resolution of any supposed controversy.

B. Verizon Illinois Has No Federal Obligation To Set Its Payphone Line Rates in Accordance with the New Services Test

If the Commission were to address the merits of IPTA's petition, it should summarily deny the petition with respect to Verizon Illinois. In the *Wisconsin Order*, the Commission held that its requirement that payphone line rates conform to New Services Test standards did not

[5] For example, in the case of BellSouth, state commissions in all nine states where BellSouth is an ILEC approved existing or newly filed pay telephone access tariffs in orders issued after April 15, 1997. In three BellSouth states, state commissions approved BellSouth's tariffs filed after April 15, 1997, without modification, and no refunds were required. In those three states, following the issuance of the *Wisconsin Order* by the FCC, IPPs' trade associations initiated *new* proceedings to establish still lower payphone line rates; they also claimed that they were entitled to refunds. Because BellSouth was charging rates that had been explicitly ordered by the state commissions, the possibility that the state commission might later order BellSouth to modify its rate (based on the guidance included in the *Wisconsin Order*) could not retroactively affect the state commission's *prior* determination that such rates were lawful and that BellSouth was therefore obligated to charge them in accordance with its effective tariffs. The IPTA petition does not present that issue and therefore cannot provide an appropriate vehicle for its resolution.

Similarly, the New York Public Service Commission approved Verizon New York's tariffed rates in 2000 (a decision reaffirmed in 2001), holding that they properly complied with the federal New Services Test. The New York appellate court ruled earlier this year that, in the event the New York commission orders still lower rates prospectively, IPPs will not be entitled to any refund or credit. *See Independent Payphone Ass'n of New York v. Public Serv. Comm'n*, 774 N.Y.S.2d 197, 198 (App. Div. 3d Dep't 2004) ("*IPANY v. PSC*").

apply (and had never lawfully applied) to non-BOC LECs like Verizon Illinois: "we do not have a Congressional grant of jurisdiction over non-BOC LEC line rates." 17 FCC Rcd at 2064, ¶ 42. The D.C. Circuit affirmed that determination over IPPs' objections. *See New England Pub. Communications Council*, 334 F.3d at 79. For that reason, any rights that IPTA's members may have with regard to non-BOC LEC payphone line rates is a matter of state law and outside this Commission's jurisdiction. *See* 47 U.S.C. § 152(b).

IPTA raises two contrary arguments in its petition; both are easily dismissed. First, it claims that the *Wisconsin Order* "amended" the Commissions "earlier orders" such that the Commission's rules applied to non-BOC LECs between the adoption of the original *Payphone Order* and the release of the *Wisconsin Order*. IPTA Pet'n at 5. But the *Wisconsin Order* did not amend any prior rules in this regard; rather, it made clear that the Commission had overstepped its statutory authority in adopting regulations governing non-BOC LEC payphone line rates in the first place. A regulation adopted in excess of the Commission's statutory authority cannot be enforced; it is not merely subject to later amendment. *See, e.g.*, *Independent Cmty. Bankers of Am. v. Board of Governors of the Fed. Reserve*, 195 F.3d 28 (D.C. Cir. 1999) (citing *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958)).

Second, IPTA argues that the Commission's "jurisdiction over the provision of dial-around compensation" gave the Commission authority to "require[] Verizon [Illinois] to provide cost-based rates to payphone providers as a prerequisite for receiving dial-around compensation." IPTA Pet'n at 9. But even assuming for the sake of argument that the Commission required *any* LECs to "provide cost-based rates to payphone providers as a prerequisite for receiving dial-around compensation," this argument is plainly wrong. The Commission has already held that it did not have authority under *any* provision of section 276 –

including section 276(b)(1)(A) – to adopt a requirement that a non-BOC LEC set its rates for payphone lines at cost-based rates. Accordingly, the Commission could not adopt that requirement either directly or indirectly by conditioning eligibility for congressionally mandated compensation on the modification of rates that are outside the Commission's statutory authority. *See, e.g., Continental Air Lines, Inc. v. CAB*, 522 F.2d 107, 115 (D.C. Cir. 1974); *see also Towns of Concord v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992). Indeed, IPPs made this precise argument before the D.C. Circuit, arguing that section 276(b)(1)(A) authorized the Commission to regulate non-BOC payphone line rates. The court rejected the argument. *See New England Pub. Communications Council*, 334 F.3d at 78 ("the sources of the Commission's authority to regulate intrastate payphone rates[] expressly apply only to the BOCs").

C. In Determining That State Tariffs Would Continue To Govern Basic Payphone Line Rates, the Commission Made Clear That State Procedures and Remedies Would Apply

As to SBC Illinois, IPTA's Petition is without merit for a basic reason: the Commission made clear in its original *Payphone Orders* that payphone line rates would continue to be governed by state tariffs. In so doing, the Commission necessarily understood that state procedures and remedies would apply to the enforcement of federal rights. Indeed, not only did the Commission *not* provide for automatic refunds in all cases, but the Commission's orders are also inconsistent with IPTA's claim.

In the *First Report and Order*, the Commission held that "tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies." Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20615, ¶ 147 (1996) ("*First Report and Order*"). In the *Order on Reconsideration*, however, the Commission – *over IPPs' objections* – eliminated the

requirement that LECs file federal tariffs for "basic payphone line[s]." 11 FCC Rcd at 21308, ¶ 163. Instead, the Commission held that it would "*rely on the states* to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." *Id.* (emphasis added). It would have been evident to the Commission that disputes about state tariffs' compliance with federal requirements might arise, either immediately or at a later date. By "rely[ing] on the states," the Commission ensured that any proceedings for enforcement of these requirements would take place before state commissions with judicial review as provided under state statute. *Id.*

Nothing in the *Payphone Orders* supports any suggestion that the Commission intended to require automatic refunds (or equivalent relief) in the event that a state eventually determined that a BOC's payphone line rates should be reduced in light of the New Services Test. There is no such statement anywhere in those orders or in any of the subsequent *Bureau Waiver Orders*. To the contrary, those orders make clear that the Commission did *not* anticipate that payphone providers would automatically be entitled to refunds. Most revealingly, in the *Order on Reconsideration*, the Commission did *not* require all BOCs to file new tariffs for basic payphone line services. Instead, the Commission noted that "[w]here LECs have already filed intrastate tariffs for these services, states may," after considering federal requirements, "conclude: (1) that existing tariffs are consistent with the requirements of the [*Payphone Orders*]; and (2) that in such case no further filings are required." *Order on Reconsideration*, 11 FCC Rcd at 21308, ¶ 163.

The Commission thus made clear two critical points: first, that existing state tariffs could continue to govern charges for payphone lines and, second, that the remedy in cases where such tariffs were later reviewed and found to be inconsistent with federal requirements would be

prospective (*i.e.*, "further filings"). The Commission would have understood that, under ordinary filed tariff principles, such a procedure would not include any provision for refunds of amounts charged under valid state tariffs. Had the Commission intended to ensure that refunds or reparations would be available to PSPs, it would have ordered a quite different procedure. For example, it could have ordered all BOCs to file new state tariffs, and it would have directed state commissions to require reparations in the event that such tariffs were found to be inconsistent with federal requirements (leaving to one side the question whether such a requirement would have been lawful). The Commission did not follow any such course.

The *Second Bureau Waiver Order*[6] likewise makes clear that nothing in federal law mandates automatic refunds in cases where a state reduces payphone line rates based on the New Services Test. In that Order, the Common Carrier Bureau granted a limited waiver to allow LECs to file intrastate tariffs for certain payphone services within 45 days after the original April 15, 1997, deadline. The Bureau expressly conditioned the waiver, however, on a commitment to "reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates." 12 FCC Rcd at 21379-80, ¶ 20.[7] If, as IPTA argues, LECs were under an independent obligation to reimburse IPPs in all cases where existing tariffs were later found to exceed levels dictated by the New Services Test, there would have been no reason to impose this condition on the waiver.

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[6] Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370 (1997).

[7] SBC Illinois did not rely on the waiver order. Verizon Illinois relied on the waiver to a limited extent in filing new tariffs for certain network features and a smart payphone line that is not widely used. Verizon Illinois has already provided any credits to customers for which the rates contained in the tariffs it filed on May 19, 1997, were lower than its prior rates. Accordingly, the waiver order has no relevance to the issue presented by IPTA's petition. *See IPANY v. PSC*, 774 N.Y.S.2d at 198 ("new rates were not filed and the refund order was thus never effective").

In sum, IPTA's basic claim – that it has a federal right to refunds of amounts charged under effective state tariffs, no matter what the circumstances, in cases where rates in those tariffs are reduced to conform to the New Services Test – is unsupported by and, indeed, inconsistent with the Commission's orders.

D. The ICC's Order Is Correct Under General Filed Rates Principles

The propriety of particular states' procedural and remedial rulings is not an appropriate subject for a declaratory ruling, because it does not involve any question of interpreting or applying the Act or the Commission's rules. *See* Order on Reconsideration, *Applications of Clarklift of San Jose, Inc. and Moore Material Handling Group*, 15 FCC Rcd 4616, 4617-18, ¶ 5 ("The Commission generally does not have the expertise or resources to resolve questions of state . . . law outside its principal area of jurisdiction."). Accordingly, IPTA's arguments about the correctness of the ICC Order are properly addressed in state court, not before the Commission. Even brief consideration of those arguments, however, makes clear that the ICC Order is a correct application of the very filed rate principles that IPTA claims should govern.

It is a basic principle of federal (and Illinois state) law that rates that have been reviewed and approved by the responsible regulatory agency cannot later be subject to refunds. *See Arizona Grocery*, 284 U.S. 370; *see also Mandel Bros., Inc. v. Chicago Tunnel Terminal Co.*, 117 N.E.2d 774 (Ill. 1954). In *Arizona Grocery*, the Interstate Commerce Commission set a maximum allowable rate for a certain route. Later, in another proceeding, the Interstate Commerce Commission set a lower rate and ordered reparations for payments that exceeded the new rate. The Supreme Court rejected the reparation award, holding that "by virtue of the Commission's order" the prior rate was "a lawful – that is, a reasonable – rate." *Arizona Grocery*, 284 U.S. at 387. Such rates remain lawful until the Interstate Commerce Commission

enters an order setting a lower rate: "As respects its future conduct, the carrier is entitled to rely upon the declaration as to what will be a lawful, that is, a reasonable, rate." *Id.* at 389.

The ICC had approved SBC Illinois' prior payphone line rates in 1995. Accordingly, SBC Illinois was entitled (indeed, required) to charge those rates until superseded by a subsequent filing or ICC order.[8] This is precisely what the ICC concluded in its order.

IPTA disputes this conclusion by arguing that a change in "the situation existing at the time the previous order was entered," IPTA Pet'n at 12 (emphasis removed), means that a prior determination that an existing tariff is lawful is no longer binding.[9] IPTA provides no support for that proposition, and it is incorrect. As a matter of Illinois statutory law and the filed rate doctrine, SBC Illinois and Verizon Illinois were obligated to charge rates set forth in their effective tariffs, and that did not change when the Commission adopted additional requirements applicable to those rates. To the contrary, it is a settled principle of filed rate law that where an agency determines that an existing rate is unreasonable – including in circumstances where that determination reflects new legal requirements – the new rate is to be applied only prospectively. *See, e.g., East Tennessee Natural Gas Co. v. FERC*, 863 F.2d 932, 941-42 (D.C. Cir. 1988) ("Existing filed rates which the Commission finds to be unreasonable can . . . be remedied only prospectively."); *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182, 187, 189 n.7 (D.C. Cir. 1986).

[8] Verizon Illinois' principal payphone line rate was approved by the Commission in 1993. Verizon Illinois' rates for smart lines (again, a service used by very few IPPs) were filed in 1997 and were never suspended. As a result, they were deemed lawful as a matter of state law, and the ICC could not order Verizon Illinois to provide refunds or reparations based on a later determination that such rates should be reduced. The ICC did not need to reach this issue because it found that the federal New Services Test requirement did not apply to Verizon Illinois and IPTA made no argument that refunds were required under state law.

[9] IPTA might also be understood to argue that a "hearing" is required for tariffed rates to be considered lawful rates for purposes of *Arizona Grocery*. *See* IPTA Pet'n at 12-13. That requirement has no support in law or logic: if a state commission approves a rate as lawful, the only prerequisite to the application of *Arizona Grocery* is satisfied, because the carrier is equally entitled to rely on that finding, whether or not there has been a prior hearing.

Cf. Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990) (noting that long-standing interpretation of filed rate doctrine would be followed absent legislative action to change it). There is nothing in the *Payphone Orders* to suggest that the Commission intended to call that basic principle into question – as noted above, the Commission specifically anticipated that carriers might leave existing rates in effect, knowing that any subsequent state commission determination that such rates were unreasonable would, depending on the law and facts in a given state, have only prospective effect.

II. THE COMMISSION SHOULD DENY IPTA'S REQUEST FOR A DECLARATION THAT SBC ILLINOIS AND VERIZON ILLINOIS WERE INELIGIBLE FOR PAYPHONE COMPENSATION

A. IPTA Lacks Standing To Raise the Issue of LEC PSPs' Eligibility for Per-Call Compensation

For many of the same reasons that the Commission should exercise its discretion to deny IPTA's request for a declaratory ruling on the issue of entitlement to refunds, it should also deny the request for a ruling on the question of eligibility for per-call compensation – that is, it is an issue that affects only one state and depends on facts and circumstances not fully explored in the record. The Commission should deny this request for an additional reason as well: IPTA has no standing with respect to this issue.

It is well established that "the presence or absence of standing is a useful factor to consider in determining whether a 'controversy' or 'uncertainty' exists in a form sufficiently crystallized to warrant our consideration in the context of a declaratory ruling." *Omnipoint Order*, 11 FCC Rcd at 10788, ¶ 7.[10] IPTA plainly lacks standing to challenge any PSP's past

[10] The sound exercise of discretion is a separate question from that of jurisdiction. *See* Memorandum Opinion and Order, *American Communications Services, Inc. MCI Telecomms. Corp. Petitions for Declaratory Ruling*, 14 FCC Rcd 21579, 21589, ¶ 19 (1999) (holding that the Commission has authority to issue a declaratory ruling even in cases where the ordinary requirements of jurisdiction – including ripeness and petitioner standing – are not met).

eligibility for per-call compensation. IPTA's members do not pay per-call compensation. Accordingly, even assuming for the sake of argument that a particular LEC was ineligible for per-call compensation during some period, this would not give rise to any injury to IPTA's members. IPTA would have suffered no damages, and the ICC Order means that IPTA has no claim for prospective relief. Thus, IPTA's members have suffered no "'distinct and palpable' personal injury-in-fact that is . . . redressable by the relief requested." *Id.* at 10788, ¶ 8 (quoting *Branton v. FCC*, 993 F.2d 903, 908 (D.C. Cir. 1993)).

Insisting upon standing is particularly appropriate in cases where the circumstances of a petition suggest that an issue is being raised for an improper purpose. That seems to be the case here – IPTA would not be entitled to any relief if it were determined that SBC Illinois or Verizon Illinois had been ineligible for per-call compensation; the only apparent benefit would be harassment of a competitor.

This conclusion gains added force in light of the fact that the Commission has already suggested an appropriate procedure in a case where a payor of payphone compensation believes that a particular PSP was ineligible in a particular state. The Commission held that "IXCs questioning the veracity of a LEC's certification [of eligibility for compensation] are obligated to challenge the LEC's compliance [and] may initiate a proceeding at the Commission."[11] No IXC has done so. Accordingly, to address this issue in this proceeding would be inconsistent with the procedure that the Commission already established.

B. SBC Illinois and Verizon Illinois Have Been Eligible for Payphone Compensation Since April 15, 1997

Even if the Commission were to address this issue, it should rule against IPTA on the merits. First, as discussed above, any purported requirement that Verizon Illinois set its

[11] Memorandum Opinion and Order, *Bell Atlantic-Delaware v. Frontier Communications Servs.*, 14 FCC Rcd 16050, 16068, ¶ 27 (1999).

payphone line rates at any particular level as a condition of eligibility for per-call compensation was void from the outset because it was in excess of the Commission's statutory authority. Verizon Illinois cannot be ineligible for compensation based on supposed failure to meet a condition that was unlawfully imposed.

As to SBC Illinois, IPTA is incorrect that SBC Illinois failed to meet any conditions for eligibility for per-call compensation. The conditions for such eligibility were enumerated in the *Order on Reconsideration*. There, the Commission stated that to be eligible for per-call compensation, a LEC would have to be able to certify that:

> (1) it has an effective cost accounting manual ("CAM") filing; (2) it has an effective interstate CCL tariff reflecting a reduction for deregulated payphone costs and reflecting additional multiline subscriber line charge ("SLC") revenue; (3) it has effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; (4) it has deregulated and reclassified or transferred the value of payphone . . . [CPE] and related costs . . . (5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones); and 6) it has in effect intrastate and interstate tariffs for unbundled functionalities.

Order on Reconsideration, 11 FCC Rcd at 21293, ¶ 131. The Commission also required BOCs to file CEI plans. *Id.* at 21294, ¶ 132. SBC Illinois complied with all of these requirements (and Verizon Illinois complied with all of the requirements that applied to non-BOC LECs).

The Commission also established certain requirements that states would be required to apply in determining whether the "intrastate tariffs" were consistent with federal standards, including application of the New Services Test. But the Commission never suggested that a prior determination that a tariff was in compliance with the New Services Test was required in order for a LEC to be eligible for per-call compensation. To the contrary, the Commission did not require any new intrastate filings prior to April 15, 1997, and the Commission would therefore have understood that there would be subsequent disputes about whether state tariffs in

fact met the Commission's pricing standards. The remedy for a tariff that was not in conformity with the Commission's standards would be whatever remedy applied under state procedures.

IPTA claims that the Common Carrier Bureau's later waiver orders indicate that a subsequent state commission determination that a LEC's rates are in excess of the levels required under the New Services Test may retroactively disqualify a LEC for per-call compensation. But such a reading of the Common Carrier Bureau's order is not only inconsistent with the plain terms of the Commission's orders (and therefore invalid) but also nonsensical.[12] As the underlying proceeding at issue here illustrates, a state investigation of a filed tariff may take years; in this case, the Commission radically modified the requirements of the New Services Test during the course of the proceeding. SBC Illinois (and Verizon Illinois) took every step that they were required to take to comply with the requirements of the *Payphone Orders*. The state commission investigation of effective tariffs took time in part because interested parties either failed to participate – in the case of IXCs – or failed to pursue their petition with diligence – in the case of IPTA's members. The only sensible reading of the Commission's orders is that the Commission intended to require carriers to have state tariffs on file to govern basic payphone lines and to require the states to review those tariffs to ensure compliance with the federal cost standards. Because SBC Illinois (and Verizon Illinois) had such tariffs on file in accordance with the Commission's requirements, they fully complied with the eligibility requirements of the *Payphone Orders*.

CONCLUSION

[12] It is far from clear that this is what the Bureau meant. *Compare, e.g.*, Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 20997, 21011, ¶ 30 (1997), *with id.* at 21012, ¶ 33 (noting that "for purposes of meeting all of the requirements necessary to receive payphone compensation" the question is "whether a LEC has effective intrastate tariffs").

The Commission should deny the petition.

Respectfully submitted,

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